A Perfect Storm

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On 9 June 2019, Hong Kong became the focus of international attention as hundreds of thousands of demonstrators marched on Hong Kong Island to oppose the imminent enactment of a bill that would introduce a rendition arrangement, *inter alia*, as between Hong Kong and other parts of China (including mainland China, Taiwan and Macau). This legislative proposal has not only led to the largest protests in the history of postcolonial Hong Kong but has also brought about one of the greatest crises of governance in post-1997 Hong Kong.

Hong Kong politicians and civil society have been highly polarized since the introduction of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 (hereafter referred to as "the Bill") in March 2019,[1)] with the "pro-China camp" supporting the Bill and the "pro-democracy camp" (also known as the "pan-Democrats" or the "Opposition") strongly opposed to the Bill. Several foreign governments, including the USA, Canada, Britain, Germany and Australia, as well as the EU, publicly expressed concerns about the Bill. On the other hand, the Chinese central government in Beijing publicly expressed support for the Bill in May 2019, and criticized foreign interventions in China's domestic affairs.

The demonstration against the Bill on 9 June was the largest demonstration in the history of postcolonial Hong Kong since the demonstrations against a national security bill in 2003 (which led to the bill being withdrawn) and during the pro-democracy "Occupy Central" (or "Umbrella") movement in autumn 2014. Nonetheless, the HKSAR government decided to press ahead with the final stage of the legislative process that was scheduled to begin with the commencement of the Legislative Council debate on the Bill on 12 June. On the morning of that day, Hong Kong's downtown area and streets surrounding the Legislative Council building was occupied by tens of thousands of demonstrators, with the protest escalating into what the Hong Kong police called a "riot" (a label which opponents of the Bill strongly contested)[2)] Subsequently, the Commissioner of Police at a press conference on 17 June clarified that the use of the term "riot" only referred to the behavior of some violent protesters and not to all or most of the participants in the protest on 12 June (see here). He pointed out that "[u]p to now, 15 persons have been arrested for allegedly committing riot or other violent offences. Only five of them were suspected to be arrested for riot-related offences. In addition, the Police also arrested 17 people in the vicinity on the same day for allegedly committing other crimes […]". in the afternoon, to which the police responded with large volumes of tear gas, pepper balls, baton rounds and even rubber bullet shots and bean bag shots. The President of the Legislative Council decided that the circumstances were such that it was impossible for the Council to begin the series of debates on the Bill that were originally scheduled to begin on 12 June and put to a vote on 20 June. Then, on 15 June, HKSAR Chief Executive Mrs Carrie Lam announced that the legislative

process on the Bill would be immediately suspended, and the issues raised by the Bill would only be dealt with again after further consultation.

This article seeks to introduce the legal and political background of the Bill, and to explain the nature of the controversy in the context of the tensions and contradictions generated by China's policy of "One Country, Two Systems" (OCTS) which has been applied to Hong Kong since the handover of 1997. OCTS, as embodied in the Sino-British Joint Declaration on the Question of Hong Kong in 1984, means the retention of Hong Kong's existing economic and legal systems after its reunification with China in 1997, with the HKSAR enjoying a high degree of autonomy as part of the PRC under the Basic Law of the HKSAR of the PRC.

A short history of Hong Kong's extradition laws

Before the handover on 1 July 1997, colonial Hong Kong's extradition law consisted largely of British Acts of Parliament and Orders in Council made applicable to Hong Kong. Extradition was mainly practised as between Hong Kong and other Commonwealth jurisdictions. No extradition was practised between Hong Kong and mainland China.[3)] In the 19th century, there did exist Hong Kong ordinances on Chinese extradition, but these laws subsequently fell into disuse. See Janice M. Brabyn, 'Extradition and the Hong Kong Special Administrative Region' (1988) 20 Case W. Res. J. Int'l L. 169 at 183-4. Shortly before the handover, as part of the exercise to localize British laws that were applicable to Hong Kong, the Fugitive Offenders Ordinance ("FOO") was enacted and came into force in April 1997. This Ordinance enabled extradition to be practised as between Hong Kong and foreign States with which the HKSAR has entered into extradition treaties – a competence that is vested in the HKSAR by the Basic Law. The provisions of the FOO largely followed British extradition law and incorporated many principles of the United Nations Model Treaty on Extradition and London Scheme on Extradition Within the Commonwealth. For examples, there would be no extradition with regard to political offences, persons prosecuted by reason of their political opinion, religion, race, or nationality, or whose fair trial may be prejudiced for any of these reasons, and persons at risk of torture if extradited. Since 1997, the HKSAR has entered into extradition treaties with 20 countries; more than 100 persons – largely foreign nationals – have been surrendered by Hong Kong pursuant to these treaties, with the USA being the destination of the largest number of surrenders.

A significant feature of the FOO and the related Mutual Legal Assistance in Criminal Matters Ordinance ("MLAO") is that neither of these ordinances is applicable to other parts of China (including mainland China, Taiwan and Macau). Apparently, at the time of enactment of these laws, it was considered that given the vast differences between Hong Kong's common-law based legal system and the socialist legal system in mainland China, Hong Kong was not yet ready to enter into rendition arrangements with the mainland – a matter which would have been dealt with at a future point in time.

The case that started it all

In March 2018, Chan Tong-kai, a 20-year old Hong Konger travelling with his girlfriend to Taiwan on holiday, was suspected of having murdered his girlfriend and then fleeing to Hong Kong. He was subsequently arrested in Hong Kong and prosecuted for money laundering. Taiwan authorities requested Chan's extradition to Taiwan. Under the existing law, Hong Kong courts have no jurisdiction to try a murder case where the murder has been committed outside Hong Kong. It seems therefore that justice would require Chan's extradition to Taiwan for trial.

However, given the exclusion of "other parts of the PRC" from the application of the FOO (Taiwan being considered part of China under this law), the Hong Kong government found that there was no legal basis for Chan's extradition to Taiwan. Chief Executive Carrie Lam decided to embark on a legislative exercise to introduce into the FOO a mechanism of making *ad-hoc* extradition arrangements on a case-by-case basis (in the absence of extradition treaties) with any foreign jurisdiction, including more than 170 States with which Hong Kong has not entered into any extradition treaty, as well as mainland China, Taiwan and Macau. It was also proposed to remove the exclusion of "other parts of the PRC" from the application of the MLAO. These legislative proposals, if adopted, would not only provide the legal basis for the extradition of fugitive offenders like Chan to Taiwan, but also facilitate extradition between Hong Kong and other jurisdictions on an *ad-hoc* case-by-case basis in the absence of an extradition treaty. And for the first time there would be a rendition scheme applicable between Hong Kong and mainland China – even though the two sides have not yet been able to enter into a long-term rendition agreement despite years of negotiations after 1997.

The original proposals were first published on 13 February and discussed in the Legislative Council's Panel on Security on 15 February 2019. After consultations with business stakeholders regarding rendition to mainland China for business-related offences committed in the past, the proposal was refined and the Bill was gazetted on 29 March and introduced into the Legislative Council (LegCo) on 3 April.

Growing protests and expedited legislative procedures

The momentum of protests against the Bill built up gradually, with the first demonstration against it on 31 March, followed by another demonstration of a larger size on 28 April (with 130,000 participants as estimated by the organizers and 22,800 estimated by the police). The LegCo formed a Bills Committee to study the Bill which met for the first time on 17 April. The Committee failed to operate, however, because the pan-Democrats filibustered at its first two meetings making it impossible to elect a Chairman. The pro-China legislators then convened further meetings of the Committee whose legality and validity were contested by the pan-Democrats.[4)] After the first two meetings of the Bills Committee, the "pro-China" camp of legislators secured a direction from LegCo's House Committee to replace

the (temporary) chairman of the Bills Committee (who belonged to the pan-Democrat camp) by a LegCo member from the pro-China camp. Then both the pan-Democrats and the pro-China camp purported to convene their own Bills Committee meetings twice. On 20 May, the Government decided to by-pass the Bills Committee and to commence the final stage of the legislative process on 12 June. To compensate for the lack of deliberations on the Bill in the Bills Committee, the LegCo Panel on Security convened to discuss the Bill on 31 May-5 June. A slightly revised package had been announced by the government on 30 May to narrow down the offences covered by the proposed extradition arrangement and to improve the safeguards for the rights of the accused.

Just a pretext?

Apart from concerns expressed by foreign governments and in a joint statement issued by 67 international institutions, the Taiwan authorities in a series of statements issued since 9 May indicated that they would not cooperate on Chan's surrender to Taiwan if it was to be conducted on the basis of the Bill (which implied that Taiwan was part of the PRC). Taiwan authorities also expressed sympathy for the public opposition to the Bill in Hong Kong. On 13 June, President Tsai Ing-wen categorically excluded the possibility that Taiwan would request Chan's surrender if the Bill were to be passed.

A main justification provided by the government when it initiated the legislative exercise was the need to extradite Chan to Taiwan. The government also argued that there was urgency in the Bill being passed as Chan was to be released from prison in October 2019 after serving his sentence for money laundering, and that if the extradition arrangement were not in place by that time, he would simply go free. The negative reaction of the Taiwan authorities to the Bill undercut the government's justification for the Bill and its urgency.

Many members of the public in Hong Kong doubted whether the Chan case was no more than a pretext for the introduction of a legislative scheme that was principally designed to achieve the rendition of people in Hong Kong to face trial in mainland China. Many politicians and members of the legal community opposed the Bill on the ground that it would put the people of Hong Kong at risk of being extradited to face trial in the mainland whose legal system was not trusted by many Hong Kong people, who doubt whether it would provide a fair trial for the accused. There were also concerns that once the rendition process is initiated in any case by the Chief Executive at the request of Beijing, there is little which the courts can do to reject the request, because the existing law on extradition only requires the requesting state to provide written evidence that would constitute a *prima facie* case against the accused, and the accused cannot adduce evidence or call witnesses to prove their innocence.

Furthermore, many people who opposed the Bill did not understand the scope of its application and were fearful that they could be extradited to mainland China even if the alleged crimes were committed in Hong Kong rather than in mainland China. Others worried that they might be framed and falsely accused for the purpose of

extradition to mainland China. Even the Chief Executive admitted at the time the Bill was shelved that the government had failed to adequately explain the Bill to the people of Hong Kong, which presumably includes failure to explain why their fears were unfounded and why the Bill would not put them at risk.

The concerns on the part of Hong Kong people about the inadequacies of the mainland Chinese legal system are understandable. Few Western states have concluded extradition treaties with China (among them are France, Spain, Portugal and Italy). Australia signed such a treaty in 2007 but did not ratify it because of internal opposition based on concerns about the Chinese legal system. Only last week, a New Zealand court denied extradition of a suspected murderer to China, mainly because of concerns about the Chinese judicial system.

A perfect storm

In designing the Bill, the government had not only under-estimated the possible magnitude of public opposition to the Bill, but apparently failed to appreciate that there exists a fundamental practical difference between the introduction of the proposed *ad hoc* case-by-case extradition arrangement *vis-à-vis* States with which Hong Kong has not entered into extradition treaties on the one hand, and the application of the *same* scheme to mainland China on the other hand. In the former situations, even if an extradition request from a State concerned satisfies all the criteria stipulated in the FOO and the Bill, the HKSAR government has an absolute discretion not to entertain the request at all, after taking into account, for example, the circumstances of the legal and judicial system of the State concerned. However, given that the HKSAR government is appointed by and constitutionally subordinate to the central government in Beijing, it is difficult to see how the HKSAR government can reject any rendition request from Beijing that complies with the requirements of the FOO and the Bill. Hence, as far as mainland China is concerned, there is in practice no difference between the adoption of the *ad hoc* rendition scheme in the Bill and the conclusion of a long-term rendition agreement of general application. Given the well-known difficulties in negotiating such a long-term agreement which still has not been concluded more than 20 years after the handover, it is unrealistic to expect that the rendition scheme proposed by the Bill can easily gain public acceptance as the government tries to rush the Bill through the legislative process.

In retrospect, the attempt to introduce a rendition arrangement between Hong Kong and mainland, though well-intentioned for the purpose of facilitating inter-regional judicial cooperation in crime control, proved to be totally counterproductive. Politically it generated a “perfect storm” in Hong Kong that was completely unnecessary and avoidable, because unlike the introduction of national security legislation in Hong Kong to implement Article 23 of the Basic Law, rendition between Hong Kong and mainland has never been high on the Hong Kong agenda of the central government in Beijing.

A semi-democratic system practising soft authoritarianism

Even after the suspension of the Bill, half a million or more Hong Kong people took to the streets again on 16 June to demand complete withdrawal of the Bill and to protest against excessive police force against demonstrators on 12 June. In response, Chief Executive Carrie Lam publicly apologized on 18 June for "deficiencies in the work of the HKSAR government" on the legislative amendment exercise, which "has led to controversies, disputes and anxieties in society". She acknowledged that

> "[d]uring large-scale public processions over the past two Sundays, people have expressed in a peaceful and rational manner their concerns about the Fugitive Offenders Ordinance and their dissatisfaction and disappointment with the Government – especially me. I have heard you loud and clear, and have reflected deeply on all that has transpired. … During the several processions, we saw many people who love Hong Kong taking to the streets to make their views known to the Government. Parents took part for the sake of the next generation. Some who usually remain silent, and many young people, felt the need to express their opinions. I understand these feelings."

The complex legislative package originally prompted by the need to do justice following a murder committed by a Hong Konger in Taiwan led to one of the greatest crises of governance in post-1997 Hong Kong. The incident illustrates the peculiar and possibly unique feature of Hong Kong's semi-democratic political system, in which civil liberties (particularly freedoms of speech, press, association and assembly) and civil society flourish, and yet the government is not democratically elected and accountable to the people.

In authoritarian states, no demonstrations of any considerable size would be allowed, and the kind of protests that have taken place in Hong Kong against the Bill would have been inconceivable. On the other hand, in liberal democracies, protests of the scale that took place in Hong Kong against the Bill on 9 June – showing that "the people have spoken" – would have forced the government to defer to public opinion and to halt the legislative process immediately.

In Hong Kong, a peaceful march of hundreds of thousands of people on 9 June was not able to move the government, and it was only when an estimated 40,000 people (outnumbering the total size of the Hong Kong police force) surrounded the legislature on the day of the proceedings on the Bill and violence broke out, that the government gave in. The "soft authoritarian" nature of the HKSAR government is such that it would restrain itself from resorting to massive physical force against the protests of civil society.

As civil society is vibrant and strong in Hong Kong, it may prevail over government from time to time. The march of an estimated half a million people on 1 July 2003 prompted one of the pro-China political parties in the legislature to change course,

and the Hong Kong government was forced to shelve the national security bill. Now in June 2019, a similar number of demonstrators initiated the dynamics that finally pressured the government to shelve the rendition bill. It has been fortunate that in this latest test of the challenging project of “One Country, Two Systems”, the HKSAR and Beijing governments ultimately chose to submit to the logic of reason rather than the logic of coercion, as the voice of the people of Hong Kong was heard throughout the world.

The author would like to thank Dr P.Y. Lo, a Hong Kong barrister, for his comments on an earlier draft of this article.

References

- 1. See this author’s previously published commentary on the Bill here.
- 2. Subsequently, the Commissioner of Police at a press conference on 17 June clarified that the use of the term “riot” only referred to the behavior of some violent protesters and not to all or most of the participants in the protest on 12 June (see here). He pointed out that “[u]p to now, 15 persons have been arrested for allegedly committing riot or other violent offences. Only five of them were suspected to be arrested for riot-related offences. In addition, the Police also arrested 17 people in the vicinity on the same day for allegedly committing other crimes […]”.
- 3. In the 19th century, there did exist Hong Kong ordinances on Chinese extradition, but these laws subsequently fell into disuse. See Janice M. Brabyn, ‘Extradition and the Hong Kong Special Administrative Region’ (1988) 20 Case W. Res. J. Int’l L. 169 at 183-4.
- 4. After the first two meetings of the Bills Committee, the “pro-China” camp of legislators secured a direction from LegCo’s House Committee to replace the (temporary) chairman of the Bills Committee (who belonged to the pan-Democrat camp) by a LegCo member from the pro-China camp. Then both the pan-Democrats and the pro-China camp purported to convene their own Bills Committee meetings twice.
